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INVESTOR CHOICE ADVOCATES NETWORK

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

## SAN FRANCISCO DIVISION

## SECURITIES AND EXCHANGE COMMISSION,

CASE NO. 3:23-cv-06003-WHO

**MOTION FOR LEAVE TO FILE  
BRIEF AS *AMICUS CURIAE***

Date: June 12, 2024

Time: 2:00 p.m.

Judge: Hon. William H. Orrick

**PAYWARD, INC. and PAYWARD  
VENTURES, INC.,**

### Defendants.

INVESTOR CHOICE ADVOCATES  
NETWORK'S MOTION FOR LEAVE TO  
FILE BRIEF AS *AMICUS CURIAE*  
CASE NO. 3:23-CV-06003-WHO

1 Investor Choice Advocates Network (“ICAN”) respectfully moves to file a brief as *amicus  
 2 curiae* regarding the SEC’s sweeping interpretation of the term “investment contract” in this case  
 3 and the implications of its overbroad definition for investors in digital assets and other assets. A  
 4 copy of the proposed brief is attached as Exhibit A to this Motion. The undersigned counsel has  
 5 consulted with counsel for the SEC and defendants. Counsel for defendants have consented to  
 6 the filing of ICAN’s *amicus* brief. Counsel for the SEC take no position with respect to ICAN’s  
 7 motion for leave to file the *amicus* brief and reserve rights to oppose or object to the filing upon  
 8 receipt and review.

9 **ARGUMENT**

10 **I. ALLOWING THE PROPOSED AMICUS BRIEF IS APPROPRIATE.**

11 “The district court has broad discretion to appoint *amici curiae*.” *NetChoice, LLC v.  
 12 Bonta*, 2023 WL 6131619, at \*1 (N.D. Cal. Sept. 18, 2023) (quoting *Hoptowit v. Ray*, 682 F.2d  
 13 1237, 1260 (9th Cir. 1982), abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472  
 14 (1995)). “[G]enerally courts have ‘exercised great liberality’ in permitting *amicus* briefs.”  
 15 *California ex rel. Becerra v. U.S. Dep’t of Interior*, 381 F. Supp. 3d 1153, 1164 (N.D. Cal. 2019)  
 16 (quoting *Woodfin Suite Hotels, LLC v. City of Emeryville*, 2007 WL 81911, at \*3 (N.D. Cal.  
 17 Jan. 9, 2007)). “There are no strict prerequisites that must be established prior to qualifying for  
 18 amicus status; an individual seeking to appear as amicus must merely make a showing that his  
 19 participation is useful or otherwise desirable to the court.” *Id.* at 1163. In that regard, “[d]istrict  
 20 courts frequently welcome *amicus* briefs from non-parties concerning legal issues that have  
 21 potential ramifications beyond the parties directly involved . . . .” *California v. Azar*, 2019 WL  
 22 2029066, at \*1 (N.D. Cal. May 8, 2019) (quoting *Sonoma Falls Developers, LLC v. Nevada Gold  
 23 & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003)).

24 Allowing ICAN to file an *amicus* brief is appropriate in this case. As explained in the  
 25 attached brief, ICAN advocates for expanding investor access and represents the interests of  
 26 underrepresented market participants, whose interests are not represented by either party in this

1 litigation.<sup>1</sup> ICAN has a significant interest in assisting the Court’s determination of the scope of  
 2 the regulatory power of the SEC and in this Court’s interpretation and application of the federal  
 3 securities laws. ICAN’s brief concerns the significant implications of the SEC’s positions for  
 4 individual investors in digital assets. Allowing ICAN to provide its perspective will help the  
 5 Court to consider the far-reaching effects of its decision beyond the bounds of this litigation.

6 Furthermore, the brief provides a detailed historical perspective on the proper  
 7 interpretation of the term “investment contract,” thereby “address[ing] a key argument in detail  
 8 that goes beyond the analysis offered by the parties.” *Inst. of Med. Educ., Inc. v. W. Ass’n of Sch.*  
 9 & Colleges, 2013 WL 6672443, at \*3 n.1 (N.D. Cal. Dec. 18, 2013) (allowing *amicus* brief that  
 10 interpreted “critical term” in a statute). As such, the “brief is useful in that it amplifies a number  
 11 of points raised in parties’ papers.” *California by & through Becerra v. United States Dep’t of*  
 12 *the Interior*, 381 F. Supp. 3d 1153, 1163-64 (N.D. Cal. 2019).

13           **II. THE PROPOSED BRIEF COMPLIES WITH RULE 29(A) OF THE**  
 14 **FEDERAL RULES OF APPELLATE PROCEDURE.**

15           Although there is no rule of this Court governing the filing of *amicus* briefs, ICAN has  
 16 adhered to Rule 29(a) of the Federal Rules of Appellate Procedure in connection with this motion  
 17 and accompanying *amicus* brief. There are no facts relating to ICAN, or its proposed *amicus*  
 18 brief, that would result in the disqualification of the Honorable William H. Orrick from the case.  
 19 FRAP 29(a)(2). ICAN’s interest in this case, and the reasons why an *amicus* brief is desirable  
 20 and why the matters asserted are relevant to the disposition of the case, are set forth above and in  
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22           <sup>1</sup> ICAN has filed briefs as an *amicus curiae* in numerous other cases implicating investors’ access  
 23 to asset markets, including other recent enforcement actions concerning the application of the  
 24 federal securities laws to digital assets. See Brief for Amicus Curiae Investor Choice Advocates  
 25 Network, *SEC v. Binance Holdings Ltd.*, Case No. 1:23-cv-01599-ABJ-ZMF (D.D.C. filed Oct.  
 26 11, 2023), Dkt. 150; Brief for Amicus Curiae Investor Choice Advocates Network, *SEC v. Wahi*,  
 27 Case No. 2:22-cv-01009-TL (W.D. Wash. filed Feb. 13, 2023), Dkt. 43; Brief for Amicus Curiae  
 Investor Choice Advocates Network, *SEC v. LBRY, Inc.*, Case No. 1:21-cv-00260-PB (D.N.H.  
 filed Dec. 15, 2022), Dkt. 92; Brief for Amicus Curiae Investor Choice Advocates Network, *SEC*  
*v. Ripple Labs, Inc.*, Case No. 20-cv-10832-AT (S.D.N.Y. filed Oct. 28, 2022), Dkt. 683.

1 the brief itself. FRAP 29(a)(3). The contents and form of the brief comply with FRAP 29(a)(4).  
 2 In addition, regarding FRAP 29(a)(4)(E): (i) a party's counsel did not author the brief in whole or  
 3 in part; (ii) a party or a party's counsel has not contributed money intended to fund preparing or  
 4 submitting the brief; and (iii) no person—other than the *amicus curiae*, its members, or its  
 5 counsel—has contributed money intended to fund preparing or submitting the brief.

6

7 Dated: February 28, 2024

Respectfully submitted,

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